No. 94-197

In the Supreme Court of the United States

OCTOBER TERM, 1994

ELOISE ANDERSON, individually and in her official capacity as Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; and THOMAS HAYES, Director, California Department of Finance,

Petitioners,

v.

DESHAWN GREEN; DEBBY VENTURELLA; and DIANA P. BERTOLLT, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATHOLIC CHARITIES U.S.A., NATIONAL COUNCIL OF CHURCHES IN CHRIST IN THE U.S.A., AND AMERICAN JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Catholic Charities U.S.A. is the nation's largest private, social service organization. Its network of 1,400 agencies and institutions serves more than 10.5 million people of all religious, national, racial, and social backgrounds each year. Catholic Charities' services emphasize enabling people to achieve self-sufficiency.

The National Council of the Churches of Christ in the U.S.A. is composed of thirty-three Protestant, Orthodox, and Anglican communions having an aggregate membership of over forty million. The National Council is governed by a board of some 260 members appointed by its member denominations in proportion to their size and support of the Council. Among the purposes of the Council is to speak out on national issues which involve moral, ethical, and spiritual principles inherent in the Christian Gospel.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic, and religious rights of American Jews and all Americans. The American Jewish Congress has long believed that Americans, including the poorest members of our society, must be free to live where they will. The right to travel has special resonance for Jews, most of whose ancestors fled countries which restricted or discouraged their free movement and choice of place of residence.

These organizations join in this brief because they are concerned about the deep and pervasive problem of poverty in America and the failure of federal and state governments to provide adequately for the needy. They believe that the constitutional rights of the poor and less fortunate should be fully protected. They are concerned that private charitable and religious organizations, whose resources are already stretched thin, not be overwhelmed as a result of unfair and unconstitutional reductions in public assistance benefits to the indigent.[1]

SUMMARY OF ARGUMENT

In 1992, California enacted a two-tier welfare benefit system under which payments to residents who have migrated to California are limited during the first twelve months of their residence in California to the benefit levels of their prior state of residence. In most cases, new residents' benefit levels are significantly lower -- in some cases, as much as 80% lower -- than the benefit levels for their fellow California residents.

The California statute discriminates among similarly situated state residents and violates the Equal Protection Clause and the Privileges and Immunities Clause of Article IV. The state penalizes new residents who have exercised their constitutional right to travel by providing them with fewer means by which to live than it provides long-term residents. Recent migrants to California are not only worse off under this statute relative to their fellow California residents, but also are in a worse position than they were in their states of prior residence because their benefits are worth less in real terms due to California's high cost of living. Under this Court's decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969), this discrimination is subject to strict scrutiny under the Equal Protection Clause because it

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[1] Amici submit this brief in support of Respondents with the written consent of the parties. Letters of consent have been lodged with the Clerk of the Court.

penalizes the exercise of the fundamental, constitutional right of interstate travel. Neither California's interest in saving money, which is not a compelling reason, nor its interest in inhibiting migration of indigents, which is a constitutionally impermissible reason, can justify this statute.

Even if this Court employed an intermediate or lower standard of review, California's interests would not justify the undue burden the statute imposes on the right to travel freely among the states. The statute impermissibly discriminates against one class of residents even though their needs are no different from their fellow residents', and even though their contribution to California's fiscal problems is insignificant.

The California statute also violates the Privileges and Immunities Clause of Article IV, Section 2, because California's new residents are not a "peculiar source" of the fiscal crisis which supposedly motivated the statute's enactment. *See Zobel v. Williams*, 457 U.S. 55, 76 (1982) (O'Connor, J., concurring in judgment).

ARGUMENT

I. CALIFORNIA'S TWO-TIER WELFARE BENEFIT SYSTEM VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT PENALIZES THE CONSTITUTIONALLY PROTECTED RIGHT TO TRAVEL AND PROMOTES NO COMPELLING STATE INTEREST.

This case involves a California statute that generally limits Aid to Families with Dependent Children (AFDC) benefits for residents who have not resided in California

during the prior twelve months to the level they would have received in their state of prior residence. Cal. Welf. & Inst. Code § 11450.03 (West Supp. 1994) [hereinafter "California statute"]. Such new and recent residents eligible for AFDC receive either the amount of AFDC benefits that California would provide or the amount that the state from which they moved would provide, whichever is lower. Judge Levi of the Eastern District of California correctly held that the California statute violates the Equal Protection Clause, *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993), and the Court of Appeals affirmed on the basis of Judge Levi's opinion. *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994).

Under the Equal Protection Clause generally, a state may not distribute benefits to its residents unequally unless the distinction between the classes of beneficiaries rationally furthers a legitimate state purpose. *Zobel*, 457 U.S. at 60. If a state distinction is aimed at a suspect class or penalizes the exercise of a constitutional right, however, strict scrutiny applies and the state's distinction must be necessary to promote a compelling governmental interest. *Shapiro*, 394 U.S. at 634; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 n.21 (1974); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

In *Shapiro*, the Court considered several statutes which denied some public assistance to residents who had lived in their respective states (or the District of Columbia) less than one year. The Court concluded that such durational residency requirements implicated the "fundamental right of interstate movement." 394 U.S. at 638. Because the state's primary purpose of inhibiting migration of needy persons was impermissible, and because alternative purposes such as saving money were not compelling, the

Court held that the statutes violated the Equal Protection Clause. *Id.* at 629, 638.

The Court in *Maricopa County* reaffirmed its holding in *Shapiro* when it struck down an Arizona statute which required a year's residence in a county as a condition to an indigent's receiving free non-emergency hospitalization. 415 U.S. at 269. The Court held that medical care was as much a "'basic necessity of life'" as welfare assistance, and that denying such necessities to newer state residents penalized the constitutional right to travel. *Id.* at 259 (internal citation omitted). The state interest in saving money was deemed not compelling: "a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens ...." *Id.* at 263 (citing *Shapiro*). And to the extent the state was motivated by a desire to inhibit immigration of indigents, that goal was not constitutionally permissible. *Id.* at 263-64 (citing *Shapiro*). Because the state could not meet its "heavy burden" of justifying the penalty on the right to travel, the Court held that the Arizona statute violated the Equal Protection Clause. *Id.* at 269. *See also Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (state statute which required would-be voters to reside in state for one year and in county for three months furthered no compelling governmental interest and therefore violated the Equal Protection Clause).

On at least one occasion, a plurality of the Court has analyzed residency requirements under not only the Equal Protection Clause, but also directly under the right to travel. Justice Brennan, the author of *Shapiro*, concluded in writing for a plurality in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986), that a New York statute which provided civil service benefits to some but not all veterans residing in New York violated both the Equal Protection Clause and the right to travel. Whether

durational residency requirements such as the one imposed by California in this case are viewed as posing a question under the right to travel or the Equal Protection Clause, or both, the test is the same: a state law that discriminates against a class of citizens on the basis of their exercise of the right to travel is unconstitutional unless it can be justified by a compelling state interest that cannot be achieved by less restrictive means. *See id.*

California's durational residency requirement at issue here is no different in any significant respect than those struck down in *Shapiro* and *Maricopa County*, and the state's purpose of deterring migration or saving money is no more compelling here than it was in those cases. Because *Shapiro* and its progeny squarely govern this case, this Court should hold that the California statute violates the Equal Protection Clause.

A. The California Statute Penalizes the Exercise of the Fundamental Right to Travel.

This Court has long recognized, and California does not dispute, that freedom of travel is a "basic right under the Constitution." *Blumstein*, 405 U.S. at 338. The right to migrate "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966). *See Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) ("Our cases have firmly established that the right of interstate travel is constitutionally protected"); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

The California statute places an obvious and heavy penalty on the exercise of the right to travel, thereby triggering strict scrutiny review. *See Shapiro*, 394 U.S. at

634. The state provides fewer of the benefits necessary for survival to California residents who lived in a different state during the preceding year than it does to long-time California residents -- even though their needs are no different.

The statute's penalty is harsh, both in degree and nature. For example, because she had recently moved from Louisiana to California, plaintiff Deshawn Green was eligible to receive less than a third of the California AFDC benefits she would otherwise receive: she was eligible only for $190 in monthly benefits (the Louisiana level) instead of the $624 she would have received had she been in California for a year. J.A. 72.[2] And these benefits are not trivial; they are "the very means by which to live." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).[3]

The burden on the recipients in this case is very similar to the burden on the plaintiffs in *Shapiro*, whose AFDC

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[2] $624 was the maximum aid payment available for a family of three in California in 1992, the year in which all the named plaintiffs moved to California. J.A. 68. The maximum California benefit as of January 1994 was $607. Staff of House Committee on Ways and Means, 103d Cong., 2d Sess., *Overview of Entitlement Programs* 366 (Comm. Print 1994) [hereinafter *1994 Committee Print*].

[3] This Court has recognized that welfare assistance is a benefit "necessary to basic sustenance" which has "often been viewed of greater constitutional significance than less essential forms of governmental entitlements." *Maricopa County*, 415 U.S. at 259. *See also id.* at 285 (Rehnquist, J., dissenting) ("virtual denial of entry [is] inherent in denial of welfare benefits -- 'the very means by which to live'") (citing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)). *Cf. Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970) (upholding one-year residency requirement for obtaining in-state tuition and recognizing that although higher education is valuable, it cannot be equated with "food, clothing and shelter"), *aff'd*, 401 U.S. 985 (1971).

benefits were denied in their entirety for one year. California AFDC benefits are already insufficient to meet the standard of need set by the state.[4] Providing lower benefits, in some cases as much as four-fifths lower,[5] because the recipient has migrated from another state, means fewer resources will be available to purchase housing, clothing, transportation, and other necessities. Some families will simply have to do without many of these necessities. In short, if $624 a month is barely adequate or not quite adequate for a single parent with two children to purchase all the basic necessities of life in California, there can be no doubt that $190 a month would leave that family deprived of many of those vital necessities. As a practical matter, adequate housing or other necessities will be as out of reach for many residents with reduced benefits as if benefits were denied altogether.

The denial of basic necessities worked by the California statute is illustrated by the named plaintiffs' experiences. Deshawn Green could find no housing for herself and her two children on her Louisiana-based benefit of $190, much less have funds available for other necessities. J.A. 72.

Debby Venturella and her two children were eligible to receive only $341 a month, the benefit available in Oklahoma, rather than the California-based grant of $624 a month. J.A. 74-77. Although Ms. Venturella could have found housing in Oklahoma for $341, she could find nothing even approaching that price in California. *Id.* Similarly, Diana Bertollt and her young son were not able to find

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[4] *1994 Committee Print*, *supra* note 2 at 366.

[5] *See* J.A. 54, 68 (maximum AFDC benefits available in Mississippi at the time of this lawsuit were $120 for a family of three, compared to California's maximum benefits of $624 for a family of three).

any housing in California on her Colorado based-grant of $280 a month. J.A. 81.

Denying vital necessities is a more severe burden on the everyday existence of residents of a state than denying either the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), or civil service preferences, *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). The penalty in this instance, moreover, is quite different from that in *Sosna v. Iowa*, 419 U.S. 393 (1975), in which the Court upheld a state statutory requirement that petitioners for divorce be residents for one year preceding their filing for divorce. The plaintiff in *Sosna* was not denied any necessities of survival. Furthermore, at the end of one year's residence, she would be able to obtain what she sought -- a divorce -- in its entirety. In this case, the denial of basic needs to recipients is irremediable.

California does not directly argue that recipients are not penalized compared to their fellow California residents. The state claims instead that the relevant comparison is not between the two classes of California residents, but between recipients' status in California and their status in their former state. Because recipients are eligible for the same amount of benefits in California as in their former states, the state claims that recipients are in "no worse position" because of their move. Petitioners' Brief on the Merits ("Pet. Br.") at 8.

The short answer to this argument is that the comparison urged by California is irrelevant. Under the Equal Protection Clause, the proper analysis is whether California treats its *own* residents equally. "No State shall ... deny to any person *within its jurisdiction* the equal protection of the laws." U.S. Const. Amend. XIV, Section 1 (emphasis added). As the District Court correctly recognized,

> the relevant comparison is not between recent residents of the State of California and residents of other states. Were this the comparison, the result in *Zobel* would be inexplicable since no other state provided a bounty to its citizens and thus Alaska treated new residents better in this respect than residents of other states.

Green v. Anderson, 811 F. Supp. 516, 521 (E.D. Cal. 1993).

In any event, even if the relevant comparison, for purposes of the right to travel and the Equal Protection Clause, were between recipients' status before and after their move to California, the state's argument would have no merit.[6] It defies common sense to suggest that recipients are made no worse off by the California statute than they were before they moved to California. Because California has a much higher cost of living than almost all other states, recipients would receive, in real terms, fewer benefits after moving.[7] The District Court found that "the

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[6] If the state's argument were correct, it would sweep very far, justifying a two-tier system for periods substantially longer than one year, or even permanently. Indeed, Governor Pete Wilson has indicated he would expand the penalties on new residents beyond those already disallowed by *Shapiro* by denying public health and welfare benefits for newcomers for up to three years. Daniel M. Weintraub, *Wilson Favors Wait for Welfare Budget*, L.A. Times, Nov. 10, 1991 at A3.

[7] Petitioners attempt to sidestep this point by arguing that benefit levels need not relate to the standard of need. Pet. Br. at 13 n.5, 17. This may or may not be true, but it is irrelevant. Information on California's high cost of living is offered not to prove that California is required to match some cost-of-living standard, but rather to demonstrate the unsurprising proposition that recipients are in a far worse position receiving Louisiana-based benefits in California than they were

cost of living, particularly housing ... generally is much higher in California than elsewhere." *Green*, 811 F. Supp. at 521. The state does not dispute this, and the evidence is overwhelming that the District Court was correct.

Based on Fair Market Rent data compiled by the Department of Housing and Urban Development, California has the highest average housing costs in the country following Massachusetts. J.A. 87-88 (Declaration of Robert Greenstein). Similarly, Department of Commerce data for certain major metropolitan areas shows that housing costs for Los Angeles (the most populous metropolitan area in California) are second only to the Boston region and San Diego and are much higher than the national average. U.S. Department of Commerce, *Statistical Abstract of the United States* 493-95 (1994) (based on data from third quarter, 1992). The *Statistical Abstract* index compares housing costs in individual metropolitan areas to the national average cost of living indexed as 100. *Id.* The housing indices for Los Angeles and for San Diego are 169.6 and 188.1 respectively (or 69.6% and 88.1% higher than the national average).[8]

By contrast, housing costs are much lower in the states from which recipients migrated than in California. The housing index for the most populous areas of the states from which recipients moved are 80.4 for Oklahoma City, Oklahoma; 84.6 for New Orleans, Louisiana; and 118.4 for Denver, Colorado. *Id.*

California's higher costs are not limited to housing. A broader, composite cost-of-living index weighing the costs

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in Louisiana.

[8] These sources do not include data for California's other major metropolitan areas, San Francisco and Oakland.

of groceries, utilities, transportation, and miscellaneous goods and services, as well as housing, indicates that only the Washington, D.C. and Boston areas are more costly than Los Angeles and San Diego. *Id.*

By contrast, the cost of living in metropolitan areas in the states from which the three named plaintiffs migrated is much lower than it is in California. The cost of living in Los Angeles is significantly higher than the cost of living in the most populous cities in the states from which recipients moved. The composite index is 130.5 for Los Angeles, 92.6 for Oklahoma City, 96.0 for New Orleans, and 107.1 for Denver. *Id.* Moreover, the disparities in costs of living are presumably even greater for welfare recipients migrating from rural areas in states such as Louisiana and Mississippi to urban areas of California.[9]

In addition to penalizing the right to travel, the California statute implicates this fundamental right, triggering strict scrutiny, because the statute's primary objective is to impede travel. *Shapiro*, 394 U.S. at 629. As respondents have shown, the legislative history of the statute and similar measures make clear that the overriding objective was to stop welfare recipients from moving to California. Respondents' Brief on the Merits ("Resp. Br."), *Statement of the Case* B(1); *see also* pp. 14-15, *infra*. Moreover, as a natural consequence of the statute's penalty on the exercise of the right to travel discussed above, many citizens will be deterred from travelling interstate, or from settling

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[9] Plaintiffs' own situations illustrate the consequences of such cost of living differences. Debby Venturella, for example, could not find housing in California with the Oklahoma-level grant of $341, but would have been able to do so in Oklahoma. J.A. at 76.

permanently in California. *See* Resp. Br., Section I.A(3).[10]

B. California's Interests Are Not Compelling and Therefore Cannot Justify the Penalty on the Right to Travel Imposed by the Statute.

Although California now claims that the sole purpose behind the two-tier benefit statute is to save money, the record amply demonstrates that California's real purpose is to deter migration into the state. As the District Court perceived, this objective is obvious because the statute is targeted not at indigents generally, but only at those who have recently moved into the state. "Because [the statute] does not save money by cutting all recipients' benefits equally, but instead affects only the benefits of new residents, its very structure suggests a goal of deterrence." *Green*, 811 F. Supp. at 522 n.14.

The legislative background and history of this and earlier proposals in California reinforce what Judge Levi found implicit in the statute itself: California's goal is to stop migration into the state by indigents from states with lower AFDC benefits. Campaign materials pushing a ballot initiative similar to the statute in the same year fairly trumpet the goal to "reduce any incentive to come to California solely for higher welfare benefits." J.A. 24 ("fact sheet" on the initiative). *See also* J.A. 20 (petition materials state that the initiative will "**STOP** out of state welfare recipients from moving to California just to increase their

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[10] Evidence of deterrence is not, however, required. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-58 (1974).

grants") (emphasis in original); J.A. 61 (ballot pamphlet for initiative states "[n]o wonder people move to California to collect welfare" and the initiative would "end California's status as a welfare magnet").

During debate in the California assembly on a predecessor legislative proposal which was nearly identical to the state statute ultimately enacted, the principal author of the earlier proposal stated:

> Realizing that in fact funds are short in California today, it makes a great deal of sense then to insure that incentives are provided for people from other parts of the country ... that might be lured to California ... for that purpose -- to benefit from higher assistance. This legislation attempts to take care of that by requiring a one year residency requirement in California ....

Green, 811 F. Supp. at 522 n.14.[11] Additional legislative history and other background information demonstrating the purpose of the California statute are summarized in Respondents' Brief, *Statement of the Case* B(1).

Finally, the state in its application for the federal waiver necessary to implement the statute flatly stated that the "purpose of this proposal is to reduce the incentive for families to move to California to receive public assistance." J.A. 48.[12]

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[11] As the District Court concluded, after reviewing the legislative debate, "[t]here is evidence in the record to support the conclusion that the purpose of [the California statute] was to deter migration of indigents." *Id.*

[12] The amicus brief filed by four states sympathetic to California, including Minnesota which had enacted an analogous statute, reveals that those states understand that California is interested in reducing migration of poor families. These amici argue that among California's

As this Court has held, deterring migration by residents of other states is not a legitimate purpose -- let alone a compelling state interest. "[T]he purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." *Shapiro*, 394 U.S. at 629. *See also United States v. Jackson*, 390 U.S. 570, 581 (1968) (if a law has "no other purpose ... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional").

Even if one were to accept California's claim that its purpose was solely to save money, that interest is not compelling and therefore cannot justify infringing recipients' constitutional rights. The state's interest in saving money was advanced and rejected in *Shapiro*: "[A]ppellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633. *See Plyler v. Doe*, 457 U.S. 202, 249 (1982) (Burger, C. J., dissenting) ("fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons"); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) (state must "do more than show that denying free medical care to new residents saves money").[13] Similarly, in *Sosna v. Iowa*,

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interests advanced by the statute are making "welfare benefits a neutral factor in a family's decision to move" and removing "the incentive for families to move solely in order to obtain higher benefit payments." Amicus Curiae Brief for Minnesota, et al. in Support of Petitioners at 13.

[13] *See also Rivera v. Dunn*, 329 F. Supp. 554, 558-59 (D. Conn. 1971) (state may not "preserv[e] the fiscal integrity of its programs" by denying public assistance to one class of residents), *aff'd*, 404 U.S. 1054 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966) (state's

419 U.S. 393 (1975), the Court noted that the state purpose behind the one-year residency prerequisite for obtaining a divorce was quite different from "purely budgetary considerations." *Id.* at 406. In contrast to mere fiscal concerns, Iowa's interest in *Sosna* was in protecting its divorce decrees from collateral attack by other states and ensuring that those decrees would be recognized under the Full Faith and Credit Clause of the Constitution, Article IV, Section 1.

Moreover, California has failed to show that no less drastic means were available to accomplish its purpose. "Statutes affecting constitutional rights must be drawn with 'precision' ... and must be 'tailored' to serve their legitimate objectives." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (internal citations omitted). There are numerous, alternative ways for the state to save the relatively minuscule amounts saved here[14] without invidious discrimination. The ongoing national debate over welfare reform demonstrates that there are many different avenues -- work incentives, changes in eligibility rules, across-the-board benefit reductions, to name a few -- for achieving more cost-efficient welfare systems without discriminating against recipients who migrate into the state.

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fiscal interest in recovering the cost of providing transcripts of trial court proceedings to criminal defendants does not justify imposing a reimbursement requirement only on one class of such defendants).

[14] California claims that the statute would have saved $22.5 million in 1993-94. Petition for Cert. A22, ¶5 (Declaration of Dennis Hordyk). This constitutes less than one percent of what California spends on AFDC. *Id.* A23, ¶2 (Declaration of John D. Healy).

II. EVEN IF A LESSER STANDARD OF REVIEW THAN STRICT SCRUTINY WERE APPLIED, THE CALIFORNIA STATUTE WOULD VIOLATE THE EQUAL PROTECTION CLAUSE.

The state apparently recognizes the weakness of its argument that providing fewer AFDC benefits is not a penalty, because it proceeds to argue in the alternative that the statute works only an "incidental and remote" penalty; that under *Sosna v. Iowa*, 419 U.S. 393 (1975), strict scrutiny analysis is therefore not required; and that there is a rational basis for California's distinction between old and new residents. Pet. Br. at 15-16.

California misconstrues *Sosna*, which did not reject the strict scrutiny interest standard applied in *Shapiro* and *Maricopa County*. *Sosna* distinguished the durational residency requirements in those cases, which "were justified on the basis of budgetary or recordkeeping considerations," from Iowa's residency requirement which was justified by the much weightier interest in protecting its judicial decrees from collateral attack in other states. 419 U.S. at 406. *Sosna* is fairly read as holding that the durational residency requirement at issue was constitutional because the state's interest was compelling and could not feasibly be furthered by any more narrowly tailored remedy. *Id.* at 407-09 & n.20.[15]

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[15] There is no basis for California's suggestion that the penalty in *Sosna* and the penalty on recipients in this case are similar because both merely "touch[] on the right to travel." Pet. Br. at 15. The penalties in the two cases are drastically different. Unlike the recipients here, the plaintiff in *Sosna* was not precluded from purchasing any

Even if the Court were to conclude that the penalty in this case was "incidental" or "remote" and that strict scrutiny was not required, the statute would still fail under any intermediate standard of review that might be applied. Thus, we submit, the California statute would clearly be invalid under the "undue burden" test set forth in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2820 (1992), or under any "balancing" test that weighed California's interest against the burden on plaintiffs' right to travel.

As described above, the California statute penalizes interstate travel by placing basic necessities of life out of reach for many welfare recipients and therefore places a "substantial obstacle" in the path of welfare recipients migrating to California. *See id.*[16] The spousal notification provision struck down in *Casey* was an undue burden because married women wishing to have an abortion had to face an increased risk of domestic violence; under the California statute, citizens wishing to move to California must bear a substantial reduction in vital benefits.

More significantly, the "undue burden" test of *Casey* is premised on the existence of a very substantial, if not compelling, state interest -- i.e., protecting potential life. *See Roe v. Wade*, 410 U.S. 113, 154 (1973). Here, by

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of the "means by which to live." Her "benefit" was only delayed and not even partially denied; eventually she received all of what she requested.

[16] The severe impact of reduced or denied welfare benefits was recognized by Justice Rehnquist in *Memorial Hospital v. Maricopa County*, stating that "virtual denial of entry [is] inherent in denial of welfare benefits -- 'the very means by which to live.'" 415 U.S. 250, 285 (1974) (dissenting) (citing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)).

contrast, California's interest in potentially saving less than 1% of its AFDC budget is far less weighty.

The statute would fail under other variations of intermediate scrutiny as well. Even assuming that reducing state spending was an "important governmental objective," the California statute is not "substantially related to the achievement of [that] objective." *See Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980). First, the statute arbitrarily discriminates against one group of residents with no evidence that this group is less needy or better able to bear the benefit cuts. Second, the savings realized are too minuscule to effect any real change in California's budget. If saving money were sufficient justification under an intermediate scrutiny analysis, presumably California could constitutionally save funds by conditioning welfare benefits on, for example, the gender of the recipients.

Finally, for the reasons identified by the District Court and set forth in Respondents' Brief, Section I.C., the statute could likewise not survive even rational basis scrutiny. *See Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993). It is fundamentally irrational to determine the level of benefits paid to California residents who have the same needs and cost of living on the basis of which state they lived in during the previous year.[17]

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[17] The suggestion that the distinction is rational because newcomers' needs are less than those of existing state residents or that they can more easily adjust to cuts (Brief of Amici Curiae Washington Legal Foundation, et al. at 3-4, 10) -- a suggestion *not* made by California -- is on its face implausible. Indeed, the evidence is to the contrary. *See* U.S. Department of Commerce, *1990 Census of Housing: Metropolitan Housing Characteristics* 5 (Dec. 1993) (national average rents for new renters are higher than for long-term renters).

III. THE CALIFORNIA STATUTE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV.

The California statute also violates the Privileges and Immunities Clause of Article IV, Section 2, which guarantees that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Privileges and Immunities Clause applies here because citizens are classified and denied certain privileges based on their state of former residence. *See Zobel v. Williams*, 457 U.S. 55, 74-75 (1982) (O'Connor, J., concurring in judgment); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 920 (1986) (O'Connor, J., dissenting). In effect, the California statute treats new residents, during their first year of residence in California, as if they were *still* residents of their former states.

The Privileges and Immunities Clause applies if a state treats residents and nonresidents differently when the nonresident seeks to "'engage in an essential activity or exercise a basic right.'" *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in judgment) (quoting *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 387 (1978)). As Justice O'Connor stated in her concurrence in *Zobel*, which struck down an Alaska durational residency requirement:

> Certainly the right infringed in this case is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the State. It is difficult to

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In any event, even if newcomers' needs were less than those of existing state residents, this would hardly provide a rational basis for a statute like California's, under which a new resident from Alaska with two children receives $624 while a new resident from Louisiana with two children and the same needs receives $190.

> imagine a right more essential to the Nation as a whole than the right to establish residence in a new State.

Id. at 76-77. Similarly in this case, California's statute burdens any new residents who choose to settle in the state, such as the plaintiffs, by depriving them of basic means by which to survive. *See also Doe v. Bolton*, 410 U.S. 179, 200 (1973) (Privileges and Immunities Clause applies to provision of medical services). *Cf. Baldwin*, 436 U.S. at 388 (higher elk-hunting license fees for nonresidents does not violate Privileges and Immunities Clause because elk-hunting is not a fundamental activity and the license fee scheme does not deprive nonresidents "of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel").

A state law which burdens the exercise of a basic right by citizens of other states is invalid unless the noncitizens "constitute a peculiar source of the evil at which the statute is aimed" and unless there is a "'substantial relationship' between the evil and the discrimination practiced against the noncitizens." *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in judgment) (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 525-27 (1978)). *See also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65 (1988) (the restriction must be "closely related to the advancement of a substantial state interest"). Furthermore, the Court must consider whether "there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Id.* at 67 (citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)).

In no sense are recipients who migrate to California from other states a "peculiar source of the evil" at which this statute is targeted. The AFDC benefits provided to new residents are only a tiny contributing factor to California's current fiscal situation, which supposedly motivated the law's enactment.[18] It is estimated the statute would have saved the state $22.5 million in 1993-94, which is less than one percent of the state's AFDC expenditures[19] and an even smaller percentage of California's overall budget. California's claimed interest in saving money does not explain why the state chooses to pay some new migrants higher benefits (e.g., if they move from Alaska) than others (e.g., if they move from Louisiana), even though their needs as California residents are no different.

Finally, there are numerous alternative means of saving money without singling out one group of residents for discriminatory treatment based on the timing of their migration. *See* p. 17, *supra*. Accordingly, the California statute violates the Privileges and Immunities Clause of Article IV, Section 2.

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[18] *Cf. Hicklin v. Orbeck*, 437 U.S. 518, 526-27 (1978) (Alaskan statute which required that Alaskan residents be given certain hiring preferences violated the Privileges and Immunities Clause, in part because non-Alaskan residents were not the major cause of the problem that the statute was designed to remedy, namely high unemployment among Alaskan residents).

[19] *Green*, 811 F. Supp. at 518; Petition for Cert. A22, ¶5 (Declaration of Dennis Hordyk); *id.* A23, ¶2 (Declaration of John D. Healy).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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